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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE TRAVELERS INDEMNITY CO.,

Petitioner,

vs.

EWING, COLE, ERDMAN & EUBANK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CHARLES H. HOENS, JR.
Counsel of Record

LUM, BIUNNO & TOMPKINS
Attorneys for Petitioner
550 Broad Street
Newark, New Jersey 07102
(201) 622-2300

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

I.

Questions Presented

(A) Under Federal Rule of Civil Procedure 52(a), is a finding of negligence considered a finding of fact reviewable by a court of appeals under the clearly erroneous standard, or is it a mixed question of law and fact, reviewable by the court on a plenary basis?*

(B) Is such a plenary review outside the scope of the jurisdiction conferred on the court of appeals pursuant to 28 U.S.C. §1291?

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* Pursuant to Supreme Court Rule 34.1(b), the caption of this case contains the names of all parties to the proceeding in the Court of Appeals for the Third Circuit for which review is sought.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit filed in the above matter on June 22, 1983.

II.

Citations to the Opinions Below

Since the Order of Judgment entered by Chief Judge of the United States District Court Clarkson S. Fisher on March 22, 1982 (unreported, see Appendix E) amended by Order entered by Chief Judge Fisher on June 4, 1982 (unreported, see Appendix F) do not set forth the court's rationale, the court's written opinion is also included herein. (unreported, see Appendix D).

Likewise, since the Judgment Order of the United States Court of Appeals for the Third Circuit entered on June 22, 1983, (unreported, see Appendix B) and the court's Order denying Petition for Rehearing and Hearing *In Banc* (unported, see Appendix C) do not set forth the court's rationale, the court's written opinion is also included herein. (unreported, see Appendix A).

III.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 22, 1983 and its Order denying Panel Rehearing and Hearing *In Banc* was entered on July 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

IV.

Statutory Provision Involved

The statute involved in this matter is 28 U.S.C. §1291 set forth in Appendix G.

V.

Statement of the Case

The Petitioner and plaintiff below, Travelers Indemnity Company (hereinafter "Travelers"), commenced this action in the United States District Court for the District of New Jersey on or about May 3, 1978.[1] The jurisdiction of the district court arose by virtue of diversity of citizenship. 28 U.S.C. §1332. In its complaint, Travelers sued the defendant, Ewing, Cole, Erdman & Eubank (hereinafter "Ewing, Cole") for damages arising out of Ewing, Cole's activities as executive architect in connection with the construction of certain dormitory housing.[2] Travelers contended that the architect, Ewing, Cole, permitted payments to be made by the EFA to the general contractor, contrary to the provisions of the applicable contract documents and contrary to accepted professional standards resulting in damage following the bankruptcy of the general contractor.

The matter was tried to the court sitting without a jury on December 1 and 2, 1981. In an opinion filed March 11, 1982, Chief Judge Fisher found as a fact that Ewing, Cole was negligent and petitioner was awarded $441,874.00 in damages. An Order of Final Judgment was entered on March 22, 1982, which Order was subsequently amended on June 4, 1982 to include prejudgment interest. On June 22, 1983 the United States Court of Appeals for the Third Circuit filed its opinion reversing the decision of the district

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[1] An identical action was commenced on December 3, 1976, but was dismissed without prejudice by the consent of both parties on February 3, 1978 in order to permit them further discovery.

[2] Petitioner, after completing the project subsequent to its principal's default, brought suit, *inter alia*, as subrogee of the owner, New Jersey Educational Facilities Authority (hereinafter "the owner" or "EFA").

court and entered judgment on that same day reversing the district court's judgment.

On the issue of Ewing, Cole's negligence, Chief Judge Fisher stated that "it is generally accepted and New Jersey courts would probably agree, that '[t]he standards of reasonable care, which applied to the conduct of architects, are the same as those applying to like professional men engaged in furnishing skilled services for compensation. . . .'" (citations omitted) (21a).

Reviewing the evidence at trial, Chief Judge Fisher indicated that both Travelers and Ewing, Cole "offered expert testimony . . . as to what a reasonably prudent architect would have done" under the circumstances before the court. Summarizing the testimony of Mr. Broading, plaintiff's expert, Chief Judge Fisher made the following statements:

> "Plaintiff's expert testified that the purpose of having an architect certify applications for progress payments is to insure that the owner receives the work and materials for which he has paid. If payments were off-site work and materials are to be made, plaintiff's expert stated that the architect had the duty of at least acquainting the owner with mechanisms that would place the paid-for property under the owner's control. One such option would be a field warehousing arrangement whereby the EFA [the owner] not Stirling Homex [the builder] would have control of the property." (22a).

Next, Chief Judge Fisher summarized the opinion of the defendant, Ewing, Cole's "expert", one of its own employees

> "Defendant's expert testified there are *no* professional standards for an architect to follow regarding payments for off-site construction. However, the expert admitted on cross-examination that an archi-

> tect would not approve a progress payment if he knew that the materials had been stolen, or for some reason could not be delivered to the owner. Clearly, there are some standards that govern an architect's conduct." (22a).

The court found that when the project was viewed in its entirety, the owner, EFA relied extensively on the professional skill of Ewing, Cole. In having Ewing, Cole certify all progress payment applications, the EFA was attempting to insure that it received the materials for which it had paid. The court acknowledged that by refusing to make any progress payment until the property was at the construction site may have been the most effective method of assuring that the owner received the working materials for which it had paid, the decision nevertheless had been made to make payments for off-site materials, in view of the fact that modular construction was being used. However the court also found as a fact that at no time did the owner abandon its desire to be certain that it would receive all of the property for which it had paid. Notwithstanding the fact that, as plaintiff's expert testified, it is commonly known in the industry that there are methods of insuring that the owner has control, if not the possession of, materials stored off-site (such as a bonded warehouse), Ewing Cole failed to advise the owner of this or any other method of protecting EFA's property interest in materials stored away from the site. Thus, based upon the above, the trial court "found that a reasonably prudent architect in this situation would at least inform and advise his client of any methods of protecting the owner's property interest and materials stored away from the construction site." (23a).

> "Once the EFA had all the facts and options before it, it could make a choice as to what methods it

> wanted to implement and what expenses it wanted to incur. In this case defendant failed to so inform the EFA; as such, it breached its professional duty, This breach caused damage when Stirling Homex filed for bankruptcy." (24a)

The United States Court of Appeals for the Third Circuit, hearing Ewing, Cole's appeal, reversed.

It acknowledged that "tort law ordinarily does not prescribe the conduct expected of an individual in any detail. 'The infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct.' " (6a; *quoting* W. Prosser, *The Law of Torts,* at 150 (4th Ed. 1971)). It also acknowledged that "where the case concerns the level of care required of a professional, the standard usually is determined on the basis of expert testimony." (7a). Next it acknowledged that "a finding of negligence is, as a general rule, considered a finding of fact reviewable by an Appellate Court under the clearly erroneous standard." (Citations omitted) (7a). However, it then distinguished the present case from the general rule as follows:

> "Where, as here, however, the issue is whether the level of care exercised by the defendant measured up to the standard expected of a reasonably prudent architect, there is a mixed question of law and fact and an Appellate Court may review the District Court's legal conclusion on a plenary basis. Cf. *United States Ex Rel Johnson* v. *Johnson,* 531 F.2d 169, 174 n.12 (3rd Cir. 1976)." *Id.*

Then characterizing the factual finding of Chief Judge Fisher that Ewing, Cole was under an obligation to at least inform EFA that there were methods of assuring that it

received the possession of goods for which it had paid as creating a duty on the part of architects "to inform their client's counsel that there are legal mechanisms for reducing risks associated with the bankruptcy of a contractor", it determined that no New Jersey cases or other authority support this proposition. It concluded that:

> "This lack of case law or other support might not be fatal if there was any evidence in the record other than the unsupported opinion of plaintiff's expert witness that Ewing, Cole had failed to meet the standards of a reasonably prudent professional in the field." (9a).

VI.

Reasons for Granting Writ

According to Supreme Court Rule 17.1:

> "A review on Writ of Certiorari is not a matter of right, but of judicial discretion and will be granted only where there are special and important reasons therefor. . . ."
>
> "The following indicate the character of reasons that will be considered:"
>
> "(A) When a Federal Court of Appeals has rendered a decision in conflict with the same decision of another Federal Court of Appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

A. This Court of Appeals decision has created an irreconciable conflict between the Circuits.

First, the instant case is in conflict with the law of eleven of the twelve circuits, including its own. The judgment of reversal of the Third Circuit Court of Appeals is bottomed on its erroneous belief that the appropriate standard of review in this case is something other than the "clearly erroneous standard". It attempts to distinguish the case before it from any other negligence case on the basis that where "the issue was whether the level of care exercised by the defendant measured up to the standard expected of a reasonably prudent architect, there is a mixed question of law and fact, and an Appellate Court may review the District Court's legal conclusion on a plenary basis." (7a). In support of this proposition, the court relies solely on the case of *United States Ex Rel Johnson* v. *Johnson,* 531 F.2d 169, 174 n.12 (3rd Cir.), *cert. denied,* 425 U.S. 997 (1976).

An examination of this case will reveal that it offers no support for the proposition for which it was cited. In that case, at issue before the court was the Petition of Johnson for a writ of Habeas Corpus. Johnson claimed that he was denied effective assistance of counsel during his state court murder trial. The Johnson court stated that "Because the question whether trial counsel's assistance was constitutionally adequate is a mixed question of law and fact, we are not bound by the clearly erroneous rule and we may freely review the District Court's conclusions." *Id.* at 174 n.12. This case obviously offers no support for the proposition for which it was cited. Rather, what is clear from a review of the law of eleven circuits (including the Third Circuit), is that the principle that a district court's finding of negligence may not be reversed unless clearly erroneous is Hornbook Law.

A case exemplifying the rule in the District of Columbia Circuit is *Daniels* v. *Hadley Memorial Hospital,* 566 F.2d 749, 756 (D.C. Cir. 1977). In this case, the trial court had entered judgment for the defendant in a malpractice action instituted against a hospital and doctors following a patient's death. On appeal, the court of appeals for that circuit made clear that the applicable standard of review was that "findings of negligence and causation are questions of fact for the purposes of review, to be tested by the clearly erroneous standard." *Id.* It noted that its role was not to weigh the evidence *de novo* or disturb a finding if it may have reached a contrary result on the same evidence. *See also Klein* v. *District of Columbia,* 409 F.2d 164, 168 (D.C. Cir. 1969).

The rule in the First Circuit is the same. In *Burgess* v. *M/V Tamano,* 564 F.2d 964, 967-77 (1st Cir. 1977), *cert. denied sub nom., M/V Tamano* v. *United States,* 435 U.S. 941 (1978), the court, in reviewing the appeal from a finding of fact by the district court that the United States was negligent and that this negligence was the proximate cause of a tanker's striking a ledge and consequent oil spill, the First Circuit noted:

> "In reviewing the decision of a court sitting without a jury . . . the question is whether, on the record as a whole, the appellate court views the the conclusion as clearly erroneous, viz., 'when, although there is evidence to support it the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"

Id. at 976-77. Similarly, in *Merrill Trust Co.* v. *Bradford,* 507 F.2d 467, 468 (1st Cir. 1974), the estates of two individuals who drowned in a shipwreck instituted an

action against the ship's owners who also had been aboard and had also drowned. The district court, sitting as trier of fact, dismissed the complaint, since the court failed to find any negligence on the part of the owner. On appeal, the judgment was affirmed. The First Circuit determined that the appropriate standard of review for the determination of the existence or not of negligence by the trial court was the "clearly erroneous" standard. *Id.* at 468.[3]

The instant case is not only in conflict with all Circuits but the Second, it is also in conflict with the law of its own circuit on this issue. In *Wiseman* v. *United States,* 327 F.2d 701 (3rd Cir. 1964), the widow and administratrix of her husband's estate instituted an action against the United States claiming that the government's negligent maintenance of a window caused a frame to come loose in turn resulting in decedent falling to death as he cleaned the window. *Id.* at 702. The district court, sitting as trier of fact, entered judgment in favor of the plaintiff after finding that the United States was indeed negligent and that the decedent was not contributorily negligent. On appeal, the Third Circuit determined that "a finding of negligence may not be set aside unless clearly erroneous, regardless of what we, if charged with

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[3] The only support found for the instant case's aberrant view is a line of cases in the Second Circuit which espoused the view that a finding of negligence is open to a more searching review. *E.g. Master Shipping Agency, Inc.* v. *M.S. Farida,* 571 F.2d 131, 133 (2nd Cir. 1978). This is clearly an aberrant view and even the Second Circut appears to be moving away from it, indicating recently that the question whether a defendant's negligence was the cause in fact of a plaintiff's injury is a question of fact under the clearly erroneous standard. *United States* v. *Mowbray's Floating Equipment Exchange, Inc.,* 601 F.2d 645, 646, n.1 (2nd Cir. 1979).

the responsibility of the finding in the first place, would have found." *Id.* at 702.[4]

The Fourth Circuit is in accord with this view. For example, in *Tucker* v. *Calmar Steamship Corp.*, 457 F.2d 440 (4th Cir. 1972) a longshoreman sought damages from a steamship company for injuries which the plaintiff sustained while assisting in the transfer of steel pipe to a vessel's cargo hold. Plaintiff alleged that the accident causing his injuries was the result of the ship's unseaworthiness and the steamship company's negligence. The district court, sitting as trier of fact, found in favor of the defendant. *Id.* at 441. On appeal, the Fourth Circuit stated that:

> "A District Court's finding regarding unseaworthiness and negligence are generally treated as findings of fact reviewable under the "clearly erroneous standard of F.R.C.P. Rule 52(a)."

Id. at 545.

The law is likewise clear in the Fifth Circuit and, by implication, the new Eleventh Circuit.[5] In *Pittman*

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[4] Obviously, the significance of the instant case's deviation from the rule in its own circuit is of greater import than its deviation from the rule in other circuits. It is the rule of the Third Circuit that a subsequent panel of the circuit is bound by a ruling of a prior panel which can only be overruled by the entire circuit sitting *En Banc*. *E.g.*, *Hamilton* v. *Roth*, 624 F.2d 1204, 1209 (3d Cir. 1980); *see* 3d Cir. Internal Operating Procedures, VIII(C). Thus in the instant case, the Third Circuit violated its own internal rules of procedure.

[5] The Eleventh Circuit has adopted the case law of the former Fifth Circuit as its governing body of precedent. *Kingston* v. *Shipping Co.* v. *Roberts*, 667 F.2d 34, 35 n.1 (11th Cir. 1982).

v. *Gilmore*, 556 F.2d 1259 (5th Cir. 1977) a wrongful death action was instituted against a doctor in which the plaintiff alleged that the defendant physician's negligence caused the decedent's death. The district court rendered judgment for the plaintiff and found the physician's failure to employ the skill, care and diligence ordinarily possessed by a physician was the proximate cause of the defendant's death. *Id.* at 1260. On appeal, the finding of negligence was upheld based on the standard of review that the trial court's findings of fact would not be set aside by the court of appeals unless clearly erroneous. *Id.* at 1261.

Similarly, in *Newberry* v. *United States*, 554 F.2d 708 (5th Cir.), *rehearing denied*, 559 F.2d 1217 (5th Cir 1977), plaintiff's malpractice claim involving the improper prescription of birth control pills which resulted in the plaintiff's circulatory disorders was dismissed by the district court. The district court, sitting as a finder of fact, found no negligence on the part of the government physician. The Fifth Circuit utilized the clearly erroneous standard of review to affirm the district court finding. *Id.* at 709.

The Sixth Circuit view, identical to that expressed above, is exemplified in *United States Fibres, Inc.* v. *Proctor & Schwartz, Inc.*, 509 F.2d 1043 (6th Cir. 1975). Here, purchasers of equipment instituted an action against the seller manufacturer for, among other things, negligence. The district court entered judgment in favor of the plaintiff on this issue and the court of appeals affirmed. On review, the Sixth Circuit determined that all findings of the district court, including those regarding negligence, were subject to "the clearly erroneous standard of review prescribed by Fed. R. Civ. P. 52(a)." *Id.* at 1047-48. *See also, Hessler* v. *Hillwood Manuf. Co.*, 302 F.2d 61, 63 (6th Cir. 1962).

The Seventh Circuit is likewise in accord with the view. For example, in *Grayson* v. *Cordial Shipping Co.*, 496 F.2d 710 (7th Cir. 1974), a longshoreman had instituted an action against a shipowner to recover for injuries sustained while aboard a ship which plaintiff claimed were due to the defendant's negligence. The district court denied recovery, finding no negligence on the part of the defendant. Regarding the standard of review, the Seventh Circuit held that it was "well-settled that the district court's findings regarding negligence or lack thereof were to be tested by the clearly erroneous standard." *Id.* at 717. *See also, Leatherman* v. *Gateway Transportation Co.*, 331 F.2d 241, 244 (7th Cir. 1964).

In the Eighth Circuit, *Dick* v. *Lewis*, 636 F.2d 1168 (8th Cir. 1981) indicates that the same standard applies. This was a medical malpractice suit brought on behalf of a 20 year old suffering from birth defects. Plaintiffs attempted to show the defects were caused by the defendant physician's negligent mishandling of birth. The district court found as a fact that there was no negligence on the part of the physician. Since this finding of fact was not "clearly erroneous", the Eighth Circuit affirmed the district court decision. *Id.* at 1169.

Likewise, in *Stirling Drug, Inc.* v. *Yarrow*, 408 F.2d 978, 991 (8th Cir. 1969), a plaintiff sued a drug manufacturer, alleging her vision was damaged by the use of a prescription drug manufactured and sold by the defendant. The district court found in favor of the plaintiff because of defendant's negligent failure to warn plaintiff's prescribing physician of the drug's potential danger to eyesight. *Id.* at 980. The Eighth Circuit noted that its scope of review was limited—that "findings made by a court in a case tried without a jury shall not be set aside unless clearly erroneous." *Id.* at 991.

The appellant in that case made an argument similar to that made by Ewing, Cole in the case at bar and apparently adopted by the Third Circuit here. The *Stirling Drug* appellant argued that the trial court had adopted an erroneous legal standard—that the trial court had required that the defendant warn of dangers by the most effective method—which standard was higher than the admitted duty to make reasonable efforts to warn. The court of appeals, however, stated that this statement misconstrued the opinion, and rather that the trial court had found as a fact that the failure to instruct its detail men to warn doctors on whom they called constituted failure to make reasonable efforts to warn. This was a finding of fact, not clearly erroneous, and therefore allowed to stand. *Id.* at 991-92.

The Ninth Circuit utilized the identical rule in *Rudelson* v. *United States*, 602 F.2d 1326 (9th Cir. 1979). In this case, two airplanes had collided in mid-air, killing three men. A student pilot and his instructor were in one plane, a pilot in the other. Survivors of the student pilot and pilot of the second plane sued the United States on the grounds that an air traffic controller negligently caused the collision. The district court, sitting as a finder of fact, determined that the government was 20% at fault, because of negligence on the part of the traffic controller, the student was 10% at fault, and the second pilot was 25% at fault. On appeal, this decision was affirmed. The court made clear in affirming the opinion that "the application of legal standards to the facts of the case (i.e., the determination on the ultimate question of negligence) is reviewed under the clearly erroneous standard." *Id.* at 1329. *See also, Mattschei* v. *United States*, 600 F.2d 205, 208 (9th Cir. 1979).

Finally, the Tenth Circuit, in *Ramey Construction Co.* v. *Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th

Cir. 1982), demonstrates the application of the very same rule. In this case an action was instituted by a general contractor on a large resort hotel complex against, among others, the project's architect and engineer. *Id. at* 317. The district court concluded that the archiect was not guilty of any negligence or other defaults causing damage to the plaintiff. There was an appeal on this and other grounds made by the plaintiff. On appeal, even though there existed over 100 design errors and omissions made by the architect and engineer, the judgment was affirmed, since the district court had found that the number was insignificant, given the size of the project. The court of appeals' review of the record led it to affirm since the district court's finding could not be said to be "clearly erroneous". *Id.* at 322; *see also, John Long Trucking, Inc.* v. *Greear,* 421 F.2d 125, 127 (10th Cir. 1970).

Quite simply, what the case at bar amounts to is a fact finding by a trial judge where the trial judge made his choice between conflicting expert opinions. In *United States* v. *47 Bottles, More or Less, etc.,* 320 F.2d 564 (3rd Cir.), *cert. denied,* 375 U.S. 953 (1963), as in the present case, the trial judge had made his choice between conflicting expert opinions. On appeal, the Third Circuit affirmed the trial judge's findings stating "we cannot say this constituted error for there was an evidentiary basis for his resolution of conflicts. A choice between two permissible views in the weight of the evidence is not clearly erroneous." *Id.* at 571.

The actual application of a standard which results in a finding of negligence is subject to the clearly erroneous scope of review under all of the previously cited cases and not a mixed question of law and fact where an appellate court may review the trial court's finding on a plenary basis as was done erroneously by the Third Circuit in the instant case (7a).

B. This Court of Appeals decision has so far departed from the usual course of judicial proceedings to call for an exercise of this Court's jurisdiction.

Secondly, the Third Circuit Court of Appeals' challenge to plaintiff's expert testimony, given the record in this case, was to anoint itself as an expert and likewise to invade the fact finding province of the trial court in this matter, under the guise that this issue was a mixed question of law and fact. Such a standard turns the court of appeals into a *quasi* trial court in direct circumvention of the jurisdiction conferred upon it by 28 U.S.C. §1291. Pursuant to this statutory grant of power, the court of appeals must review cases and cannot try or retry fact issues; it cannot even "intimate [it] may engage in the fact finding . . . process at the appellate level." *Hill York Corp.* v. *American International Franchises, Inc.*, 448 F.2d 680, 691 (5th Cir. 1971). Furthermore, since it does not have original trial jurisdiction, it is not even equipped to handle trial functions. *Miller* v. *Avirom*, 384 F.2d 319, 322 (D.C. Cir. 1967). The court in the case at bar has thus so far departed from the usual course of judicial proceedings to call for an exercise of this Court's powers of supervision. Possibilities of synthesis are endless under the court's attempt to distinguish the instant case from the general rule. Indeed, one is left with uncertainty as to under what conditions should this new rule be applied. Does it change the standard only with respect to cases involving architect's malpractice alone? One does not really know.

If so, the standard of ordinary reasonable care adopted by the trial court and attacked as unprecedented by the Third Circuit in this case has received uniform judicial acceptance as the appropriate standard of care for professional architects. *E.g. Aetna Insurance Co.* v. *Hellmuth, Obata & Kastlebaum, Inc.*, 392 F.2d 472 (8th Cir. 1968);

Peerless Insurance Co. v. *Cerny & Associates, Inc.*, 199 F. Supp. 951, 953 (D. Minn. 1961). In order for the court of appeals to have properly reversed the findings made in the district court below, it would had to have been demonstrated that the trial court's factual finding of architectural negligence "(1) is completely devoid of minimum evidentiary support displaying some hew of creditability or (2) bears no rational relationship to the support of evidentiary data." *Krasnof* v. *Dinan*, 465 F.2d 1298, 1302 (3rd Cir. 1972). Given the record in this case, such a demonstration is impossible, hence the necessity for this newly created standard of review.

One of the most perplexing, far reaching statements in the court's opinion, however, is that having to do with its position that it was necessary that there be evidence in the record *other than the unsupported opinion of the plaintiff's expert witness* that Ewing, Cole failed to meet the standards of a reasonably prudent professional in the field. The petitioner fails to see how under any reading of the record in this case, plaintiff's expert witness's testimony can be characterized as "unsupported opinion". Mr. Breading was fully qualified as an expert witness; indeed, his qualifications stood unchallenged. He unequivocally testified of his long experience in the field, and of the standard, well known practices of those in the field, to so advise and indeed utilize the methods suggested by him. Petitioner shudders to think of what might be the implications of this statement to both the trial court judges sitting in the Third Circuit and counsel presenting cases beore these trial courts in any malpractice action. Has the court of appeals enunciated a new standard in malpractice actions, whereby a plaintiff must utilize a battery of expert witnesses to support its theory? Or does a plaintiff now have hopes of winning a malpractice case only when there has been a

reported decision of a prior case in which, under the exact same facts as presented in its case, there was a verdict in the plaintiff's favor? However, taking this position to its logical conclusion would of course mean that the prior case was incorrectly decided, since under this theory, there obviously can be no "first case" under a particular set of facts. Or does this opinion mean that in order to have "independent" expert opinion, an expert must be appointed by the court in each case?

VII.

CONCLUSION

Litigants in all the Circuits should have one guidepost to look to in determining the standard of review. Conflicts with decisions of other courts of appeals have in other cases compelled the Supreme Court to grant certiorari for review of such decisions. *E.g. Federal Trade Commission* v. *Footill Products, Inc.*, 389 U.S. 179 (1967). Eleven of the twelve circuits (including the Third Circuit) follow the view that a finding of negligence cannot be disturbed unless clearly erroneous, as was demonstrated by the review of all of the aforementioned cases. Under these circumstances, since the instant case is a clear deviation, ignoring the total body of that precedent as well as the plain language of F.R. Civ. Pro. 52(a), it is respectfully submitted that this Court should grant the instant petition.

For all of the reasons stated, it is respectfully submitted that this Petition for Certiorari should be granted.

Respectfully submitted,

LUM, BIUNNO & TOMPKINS
Attorneys for Petitioner
By: CHARLES H. HOENS, JR.

Dated: October 21, 1983

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

(Filed-June 22, 1983)

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-5390

THE TRAVELERS INDEMNITY CO., a Connecticuit Corporation,

v.

EWING, COLE, ERDMAN & EUBANK, a Pennsylvania Partnership,

Ewing, Cole, Erdman & Eubank,

Appellants.

On Appeal from the United States District Court for the District of New Jersey

C.A. No. 78-934

Argued May 11, 1983

Before: Adams and Weis, *Circuit Judges*, and VanArts-Dalen, *District Judge*.*

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* Honorable Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, siting by designation.

Appendix A

Attorneys for Appellant:

Donald F. Stevens (argued)
Chasen, Leyner, Holland & Tarrant
Jersey City, New Jersey
Of Counsel:
Clyde A. Szuch
Pitney, Hardin, Kipp & Szuch
Morristown, New Jersey

Attorneys for Appellee:

Roger P. Sauer (argued)
Lum, Biunno & Tompkins
Newark, New Jersey

OPINION OF THE COURT

Adams, *Circuit Judge*

In this appeal, Ewing, Cole, Erdman & Eubank, (Ewing, Cole), an architectural firm, chellenges the judgment of the district court that it is liable in tort for damages incurred by its client. Because we determine that the plaintiff failed to carry its burden of proving that Ewing, Cole had not met the standards of a reasonably prudent architect, we reverse.

I.

This dispute arises out of the construction of student dormitory housing for the New Brunswick campus of Rutgers University. The New Jersey Educational Facilities Authority (the Authority) and Ewing, Cole entered into a contract on September 25, 1971 under which Ewing, Cole

was to serve as executive architect for the project. The trial court found that under the terms of the contract Ewing, Cole was responsible for providing all necessary architectural and engineering services: specifically, preparation of a feasibility study and bidding documents, and administration of the contract between the Authority and the contractor. App. at A-41. Nothing in the contract required Ewing, Cole to give advice about protecting the Authority from the possibility that the contractor would file for bankruptcy, nor did the Authority ever specifically request such advice.

Stirling Homex Corporation (Stirling Homex), a manufacturer of pre-fabricated housing, was awarded the contract by the Authority. Instead of using conventional on-site construction methods, Stirling Homex proposed to manufacture modules at its plant in Avon, New York and then to ship the completed modules in groups to New Brunswick, where they would be assembled into dormitories.

Between the time the contract was awarded to Stirling Homex and July 12, 1972, when Stirling Homex filed a petition in bankruptcy, Ewing, Cole authorized five progress payments to the contractor for materials purchased and work completed at the Avon plant. Following each request for payment, a representative from Ewing, Cole visited the Sterling Homex plant. He conducted spot checks to ascertain that the materials specified in the requests for payment existed, were segregated and identified as belonging to the Authority, and were insured against theft, fire and vandalism. App. at a-44.

Shortly after Stirling Homex fixed its bankruptcy petition, a trustee in bankruptcy was appointed, who claimed title to all of the materials and work-in-progress at Stirling Homex' Avon plant, including those goods that had

been paid for by the Authority. The trial court sitting without a jury calculated the total value of the undeveloped materials and modules for which the Authority had paid to be $441,874.[1]

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[1] "Both parties stipulated that as of the filing of a petition in bankruptcy by Stirling Homex, a total of $966,891 had been paid to that body by the EPA. A total sum of $536,492 (less 10% retainage) had been requisitioned and paid on account of materials at the Stirling Homex plant to be incorporated into modules. In addition, a total sum of $488,000 (less 10% retainage) was requisitioned and paid on account of completed modules. A total of $88,169 worth of materials was later incorporated into modules and this amount was credited to the EPA. Finally, the parties stipulate that a completed module cost $4,000. Thus, the breakdown is as follows:

Material charge	$536,492	
Less 10% retainage	53,649	$482,843
Module charge	488,000	
Less 10% retainage	48,800	$439,000*
Materials credit		(88,169)
Total paid for materials and modules		833,874
98 modules delivered ($4,000 per module)		(392,000)
Total paid for undelivered materials and modules		$441,874"

App. at a-48.

* It appears that there is a typographical error in the district court's opinion and that this number should be 439,200. With this correction all other figures are consistent.

Appendix A

Stirling Homex had, at the inception of the project, procured a payment and performance bond from Travelers Indemnity Company (Travelers), in favor of the Authority. After Stirling Homex declared bankruptcy, the Authority called upon Travelers to honor its performance bond. Travelers negotiated with the trustee to obtain the goods still at the Stirling Homex plant in Avon for which the Authority had paid. When it was unsuccessful, Travelers arranged for another contractor to complete the project, and made no further efforts to assert claims to the goods and materials.

Following the completion of the project, Travelers brought suit as the subrogee of the Authority against Ewing, Cole contending that the architect had breached its contract with the Authority and had acted negligently by permitting progress payments for off-site work and materials. The district court concluded that there had been no breach of the contract between the Authority and Ewing, Cole, App. at a-45, but that the architect was liable in tort because it had violated its duty to exercise reasonable care. App. at a-47. The determination of liability was based on the conclusion that Ewing, Cole had a duty to inform "the Authority of any method whereby it could exercise control over its property." App. at a-48. The court noted specifically that the architect might have suggested to the Authority that it could have increased the protection of its interest in the property against the possibility that Sterling Homex would file for bankruptcy by employing such options as field warehouses or bonded warehouses. App. at a-47. The district court did not address the issue of causation between the alleged tort and the damage claimed, nor did it explore the question whether a government agency represented by legal counsel could reasonably have relied on its architect to suggest legal mechanisms for protecting

its property interests in materials and work-in-progress remaining in the possession of its contractor.

II.

Both parties agree that in this diversity action New Jersey law controls, and appear to accept the proposition that in New Jersey an architect may be held liable in tort if he fails to exercise that level of care expected of a reasonably prudent architect and his negligence is the proximate cause of injury to his client. *See* Note, *Liability of Design Professionals—The Necessity of Fault*, 58 Iowa L. Rev. 1221, 1228 n.47 (1978) (citing cases). It is also undisputed that Ewing, Cole did not inform the Authority that, by paying for materials and work-in-progress without gaining actual physical possession, the Authority was incurring certain risks if the contractor became bankrupt and that there were legal mechanisms that could reduce those risks, albeit at the cost of some inefficiency in the manufacturing process.

The issue in the case at hand is whether a district court sitting in diversity and applying New Jersey law, may hold a professional architect liable for not communicating such information to his client, when there is no precedent for such a finding in similar or analogous circumstances and nothing in the record to suggest that the facts here are so unusual as to merit special treatment.

Tort law ordinarily does not prescribe the conduct expected of an individual in any detail. "[T]he infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct." W. PROSSER, LAW OF TORTS, at 150 (4th ed. 1971). Instead, tort law calls upon the fact finder to deter-

mine what a reasonable person in like circumstances would have done and to compare that hypothetical conduct with the actions of the alleged tort feasor. Where the case concerns the level of care required of a professional, the standard usually is determined on the basis of expert testimony. The process for fixing liability in such a situation is advertently flexible in order to allow the law to reflect the changing attitudes and expectations of the community.

A finding of negligence is, as a general rule, considered a finding of fact reviewable by an appellate court under the clearly erroneous standard. *Sun Oil Co.* v. *Humble Oil & Refining Co.*, 431 F.2d 1119 (3d Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); C. WRIGHT and A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2590 (1971 & Supp. 1983). Where, as here, however, the issue is whether the level of care exercised by the defendant measured up to the standard expected of reasonably prudent architects, there is a mixed question of law and fact, and an appellate court may review the district court's legal conclusion on a plenary basis. Cf. *United States ex rel. Johnson* v. *Johnson*, 531 F.2d 169, 174 n.12 (3d Cir. 1976).

III.

A federal court sitting in diversity is bound to apply the substantive law of the state in which it sits. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). As this Court has noted, however, there frequently is no "readily accessible or easily understood body of state law." *McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 661 (3d Cir. 1980), *cert. denied*, 449 U.S. 976 (1980). That is the case here, and in such a situation, federal courts are called upon to predict how state courts would resolve the relevant issues. *Brown* v.

Caterpillar Tractor Co., 696 F.2d 246, 250 (3d Cir. 1982); *Barris* v. *Bob's Drag Chutes & Safety Equipment*, 685 F.2d 94, 98 (3d Cir. 1982). There are a variety of factors that a federal court should consider in making such predictions including "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." *McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d at 663; *Michelin Tires, (Canada) Ltd.* v. *First Nat. Bank of Boston*, 666 F.2d 673, 682 (1st Cir. 1981); *Town of East Troy* v. *Soo Line R. Co.*, 653 F.2d 1123, 1129 (7th Cir. 1980). None of these sources indicates that New Jersey courts would extend the professional liability of architects as far as the district court here did.

While there is some scholarly and precedental support for the position that an architect can be held liable for failing to provide certain information to his client, in each case the omitted information related to factors within the special knowledge of design professionals. For example, in *J. Ray McDermott & Co.* v. *Vessel Morning Star*, 431 F.2d 714, 722 (5th Cir. 1970), *cert. denied*, 409 U.S. 948 (1972), the Fifth Circuit held that a naval architect had a duty to warn his client that design changes suggested by the client would have been serious deleterious effects on the seaworthiness of the client's vessels. *See also* Note, *Design Professionals—Recognizing a Duty to Inform*, 30 HASTINGS L.J. 729 (1979). No New Jersey cases or articles dealing with New Jersey tort law and indeed no authority in any other state has suggested that architects have a responsibility to inform their client's counsel that there are legal mechanisms for reducing risks associated with the bankruptcy of a contractor.

Appendix A

The lack of case law or scholarly support might not be fatal if there were any evidence in the record, other than the unsupported opinion of the plaintiff's expert witness, that Ewing, Cole had failed to meet the standards of a reasonably prudent professional in the field. If there were, for example, evidence that architects regularly inform their clients of risks such as those involved here, or if some disinterested or independent body had stated that they should so inform their clients, this would be a different case. But there is no such indication of a trend toward the expansion of the liability of architects to include a duty to inform their clients about matters that have yet to be recognized as within the special expertise of design professionals.

Finally, there are no special facts in this case that might lead a court to believe that it would be appropriate to extend the legal liability of professional architects. This case did not involve an unsophisticated or helpless consumer, nor was the omitted information ever solicited. The Authority is a government agency, and was represented throughout the relevant negotiations by a Deputy Attorney General of New Jersey, who had extensive experience in construction. Deposition of Edward Schwarz at 2.12. Neither the government attorney nor the Authority ever indicated that they expected Ewing, Cole to point out potential legal pitfalls in the proposed arrangement with the contractor, and it is far from clear why an architect would believe that it had a duty to inform the legal counsel of its client about such matters. It seems a peculiarly inefficient allocation of professional responsibilities to hold architects liable for not alerting lawyers to the legal ramifications of the bankruptcy of a contractor. We can see no reason under the facts of this case to impose such a duty.

The decision of the court will be reversed.

ARLIN M. ADAMS
Circuit Judge

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

(Filed—June 22, 1983)

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-5390

THE TRAVELERS INDEMNITY CO., a Connecticuit Corporation,

v.

EWING, COLE, ERDMAN & EUBANK, a Pennsylvania Partnership,

Appellants.

Ewing, Cole, Erdman & Eubank,

(D. C. Civil No. 78-934)

On Appeal from the United States District Court for the District of New Jersey

Present: Adams and Weis, *Circuit Judges,* and VanArtsdalen, *District Judge.**

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* Honorable Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, siting by designation.

Appendix B

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel May 11, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered March 24, 1982, as amended by order entered June 4, 1982, be and the same is hereby reversed. Costs taxed against appellee.

ATTEST:

SALLY MRVOS
Clerk

June 22, 1983

APPENDIX C

Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Circuit

(Filed—July 25, 1983)

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-5390

THE TRAVLERS INDEMNITY COMPANY,

v.

EWING, COLE, ERDMAN & EUBANK,

Appellants.

(C.A. No. 78-934)

SUR PETITION FOR PANEL REHEARING
and REHEARING IN BANC

Present: Seitz, *Chief Judge,* Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker, *Circuit Judges* and VanArtsdalen, *District Judge.**

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* Honorable Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, siting by designation.

Appendix C

The petition for panel rehearing and/or rehearing in banc filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority if the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for panel rehearing and/or rehearing in banc is denied.

By the Court,

ARLIN M. ADAMS
Circuit Judge

DATED: July 25, 1983

APPENDIX D

Opinion of the United States District Court for the District of New Jersey

(Filed—March 11, 1982)

UNITED STATES DISTRICT COURT
District of New Jersey

Civil Action No. 78-934

THE TRAVELERS INDEMNITY CO., a Connecticuit Corporation,

Plaintiff,

v.

EWING, COLE, ERDMAN & EUBANK, a Pennsylvania Partnership,

Defendant.

Appearances:

Lum, Biunno & Tompkins
By: Roger Sauer, Esq.
Catherine M. Curran
550 Broad Street
Newark, New Jersey 07102

(Attorneys for Plaintiff)

Appendix D

Chasan, Leyner, Holland & Tarrant
By: Donald F. Stevens, Esq.
549 Summit Avenue
Jersey City, New Jersey 07306

(Attorneys for Defendant)

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Fisher, Chief Judge.

Plaintiff, The Travelers Indemnity Co., brings this action against defendant, Ewing, Cole, Erdman & Eubank, for damages arising out of defendant's activities as executive architect in connection with the construction of dormitory housing for the New Jersey Educational Facilities Authority. At the commencement of this action, plaintiff was a Connecticut corporation with its principal place of business in Hartford, Connecticut. Defendant was a partnership organized under the laws of Pennsylvania; no partner was a citizen of Connecticut. Diversity subject-matter jurisdiction exists under 28 U.S.C. §1332. As mandated by Fed. R. Civ. P. 52(a), I make the following findings of facts established by credible evidence and conclusions of law.

The dispute centers around the construction of student dormitory housing for the New Jersey Educational Facilities Authority (EFA), a public body of the State of New Jersey established within the Department of Higher Education. N.J.S.A. 18A:72A-1 *et seq.* In addition to the EFA, the participants in the project were: (1) Stirling Homex Corporation, a general contractor engaged in the manufacture and sale of pre-fabricated housing; (2) The

Appendix D

The Travelers Indemnity Co., plaintiff, who issued a joint performance and payment bond to Stirling Homex; and (3) Ewing, Cole, Erdman & Eubank, defendant, the executive architect of the project.

In the late 1960's and early 1970's, the EFA embarked on a program of constructing additional student dormitories at several state colleges throughout New Jersey. This case involves the construction of such dormitories at Rutgers University, New Brunswick. On September 25, 1971, the EFA and defendant entered into a contract under which defendant would serve as the executive architect for the housing program. The executive architect had the responsibility of performing all the necessary architectural and engineering services required for the program. Specifically, these services were to be performed in three phases. Phase I required defendant to study the feasibility and financial practicality of building the dormitories within certain cost guidelines. Phase II required defendant to prepare bidding documents so that qualified bidders would have complete bidding information in order for them to submit firm prices. Phase III obligated defendant to administer the contracts between the EFA and the contractor(s). In particular, defendant was required to periodically visit the construction site to assess the quality and progress of the work. Defendant was to make similar visits to the housing manufacturer's premises. In addition, defendant was required to review drawings submitted by the contractors and review the contractors' requests for periodic payments to determine whether payment was warranted.

One of the possibilities contemplated by defendant's feasibility study was "modular" housing. This type of construction entails the assembly of a pre-fabricated hous-

ing unit, or module, at the plant of the general contractor. The completed unit is then shipped to the job site for connection to a foundation. In the course of preparing the bid documents, this type of construction was selected.

In June 1971, the work was let for bids. The EFA and defendants published the General Conditions and Instructions to Bidders (Trial Exhibit J-4) at this time. The General Conditions covered, among other things, the subject of progress payments to the general contractor. To apply for such payments, the contractor was required to submit certain written certifications regarding completed work. Defendant was to either approve or disapprove of the contractor's application. If it was approved, defendant was to forward it to the EFA for payment.

After the General Conditions were published, several prospective contractors inquired as to whether the EFA would pay for work performed and materials stored at the manufacturer's plant. These inquiries were directed at Ewing, Cole, which in turn forwarded them to the EFA.

On July 19, 1971, a conference was held in Trenton, New Jersey, to allow prospective bidders to ask questions regarding the housing program. In attendance were, among others, Mr. Edward J. Bambach, the executive director of the EFA, Mr. Edward Schwartz, a Deputy Attorney General of the State of New Jersey, and Messrs. Donald M. Phimister and Nicholas Rizzio of Ewing, Cole. One of the questions asked dealt with the issue of payment for work done at the manufacturer's plant as opposed to the construction site. Mr. Schwartz responded that the state would pay for work done in the plant in accordance with the clause on payments contained in the General Conditions.

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There are in fact two sections of the General Conditions that address themselves to payment of the contractor. In the section entitled "Executive Architect's Status," it states that the architect "shall certify contractor's invoices for work performed and materials delivered to the site . . ." (Trial Exhibit J-4, p. 1/18). In the section entitled "Payment," it is provided that "[i]n preparing estimates, material delivered to and properly stored on the site and preparatory work done shall be taken into consideration." *Id.* at 1/28.

Mr. Bambach and Mr. Schwartz later discussed the answer that was given at the July 19 meeting concerning payments for work and materials at the manufacturer's plant. Both men agreed that, since the project involved modular construction, it would be reasonable to pay for "off-site" materials as long as they were identified and marked as property of the EFA.

The EFA awarded the contract to Stirling Homex, a manufacturer of pre-fabricated housing. During the course of construction, Stirling Homex submitted several applications for progress payments to Ewing, Cole. (Trial Exhibits J-5 through J-9). These documents indicate that Stirling-Homex requested, with defendant's approval, a total amount of $966,891. Of this amount, $536,492 (less 10% retainage) has been requisitioned and paid on accounts of materials at Stirling Homex' plant to be incorporated into modules; a total of $488,000 (less 10% retainage) was requisitioned for the modules themselves. Progress payment No. 5 also reflects the incorporation of $88,169 worth of materials into modules, appearing as a credit to the EFA in the requisition's tally.

Each approved application contained a statement signed by Stirling Homex which read: "The undersigned Con-

tractor certifies that the Work covered by this Application for Payment has been completed in accordance with the Contract Documents. . . ." (Trial Exhibits J-6 through J-9). Defendant indicated its approval of each application by signing beneath a statement which read: "In accordance with the Contract and this Application for Payment the Contractor is entitled to payment. . . ." *Id.**

Each time an application for payment was submitted, defendant would visit the Stirling Homex plant to verify the existence of the work and materials for which payment was being requested. Pursuant to procedures agreed to by the EFA and defendant, a Ewing, Cole representative would conduct a spot check to determine that the materials specified in the application for payment existed, that the materials were properly segregated, identified as belonging to the EFA, and insured against theft, fire and vandalism.

In approving the applications for payment, defendant realized that payment was being made for materials being stored at Stirling Homex' plant. In addition, Mr. Bambach of the EFA testified that the EFA was aware at all times that it was paying for materials that had not been delivered to the construction site.

On July 12, 1972, Stirling Homex filed a bankruptcy petition. Plaintiff was called upon at this time to honor its performance bond. Plaintiff began negotiating with Stirling Homex' trustee in bankruptcy in order to obtain the materials that the EFA had paid for but were still located at the Stirling Homex plant. The trustee, however, claimed

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* The first application for payment, Trial Exhibit J-5, contained similar representations by Stirling Homex and Ewing, Cole, although the wording differed slightly.

title to the materials and refused to acknowledge any interest on the part of the state. Plaintiff offered to purchase the modules for $2,000 per module if the trustee would put the funds in an escrow account pending the resolution of the issue of the ownership of the property. If the escrow arrangement was not acceptable, plaintiff offered to buy them outright for $700 per module. Both offers were rejected by the trustee and no agreement was reached. Plaintiff did not institute any legal proceedings to recover the property.

After completing the project, plaintiff exercised its rights as a subrogee and commenced this action. Plaintiff alleges that Ewing, Cole breached its contract and was negligent in permitting payments to be made by the EFA for "off-site" work and materials which resulted in damage after the bankruptcy of Stirling Homex.

Plaintiff's first claim is that it is entitled to recover damages from defendant for breach of contract. The contract between the EFA and Ewing, Cole contained two references to approving applications for progress payments. Specifically, defendant agreed to "[r]eview contractor(s) requests and make recommendations for periodic payments." (Trial Exhibit J-1, p.8) Furthermore, defendant agreed that "[o]n the basis of . . . on-site observations . . . [it would] endeavor to guard the OWNER against defects and deficiencies in the work of the Contractor." *Id.*

Plaintiff correctly points out that the written contract between the EFA and Stirling Homex, which incorporated the General Conditions, did not expressly authorize progress payments for work and materials not delivered to the construction site. However, "a contract, even a written contract, . . . may be modified subsequently." *Frommeyer* v. *L. & R. Construction Co.*, 261 F.2d 879, 882 (3d Cir. 1958).

Furthermore, "[e]ven a formal agreement which expressly states that it cannot be modified except in writing, is itself subject to modification. . . ." *Estate of Connelly* v. *United States,* 398 F. Supp. 815, 827 (D.N.J.) (citation omitted), *aff'd* 551 F.2d 545 (3d Cir. 1977).

The evidence in this case overwhelmingly supports the conclusion that the EFA and Stirling Homex entered into a contract whereby payments for off-site work and materials were authorized. Defendant was therefore authorized to approve such payments. The EFA agreed that such payments could be made due to the fact that this project involved pre-fabricated modular housing. Furthermore, both the EFA and defendant discussed the identification and verification procedures to be used before applications for payment were approved. Finally, at all times the EFA was aware that it had approved and was in fact paying for off-site work and materials. Under these circumstances, it is clear that the EFA, Ewing, Cole, and Stirling Homex had modified their written agreements to permit progress payments for work and materials at the manufacturer's plant. I conclude that there was no breach of contract.

Plaintiff also contends that, regardless of the contract issue, defendant is liable for damages under the tort principles of negligence. There is no New Jersey case directly on point concerning the duty of an architect to his client. However, it is generally accepted, and New Jersey courts would probably agree, that " '[t]he standards of reasonable care, which apply to the conduct of architects, are the same as those applying to . . . like professional men engaged in furnishing skilled services for compensation . . .' " *General Trading Corporation* v. *Burnup & Sims, Inc.,* 523 F.2d 98, 101 (3d Cir. 1975) (citations omitted).

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> The standard of care applicable is that of ordinary reasonable care required of a professional skilled architect under the same or similar circumstances in carrying out his technical duties in relation to the services undertaken by his agreement. This includes the knowledge and experience ordinarily required of a member of that profession. . . .

Aetna Insurance Co. v. *Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472, 477 (8th Cir. 1968). See also *Bartak* v. *Bell-Galyardt & Wells, Inc.*, 629 F.2d 523, 529 (8th Cir. 1980).

Both parties offered expert testimony at trial as to what a reasonably prudent architect would have done in this situation. Plaintiff's expert testified that the purpose of having an architect certify applications for progress payments is to insure that the owner receives the work and materials for which he has paid. If payments for off-site work and materials are to be made, plaintiff's expert stated that the architect has the duty of at least acquainting the owner with mechanisms that would place the paid-for property under the owner's control. One such option would be a field warehousing arrangement whereby the EFA, not Stirling Homex, would have control of the property.

Defendant's expert testified that there are no professional standards for an architect to follow regarding payments for off-site construction. However, the expert admitted on cross-examination that an architect would not approve a progress payment if he knew that the materials had been stolen, or for some reason could not be delivered to the owner. Clearly, there are some standards that govern an architect's conduct.

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When the construction project is viewed in its entirety, it is apparent that the EFA relied extensively on the professional skill of the executive architect. Ewing, Cole played a central role in the project, participating in the preparation of bidding documents and contracts with the general contractor, judging the quality and acceptability of the work, and reviewing all requests for progress payments. In having defendant certify all applications for progress payments, the EFA was attempting to insure that it received the work and materials for which it had paid. While delaying progress payments until the property was placed in the EFA's possession at the construction site would have been the most effective method, the EFA agreed in this case to make payments for off-site work and materials. However, this decision was made in view of the fact that modular construction was being used whereby the housing unit would be manufactured away from the construction site. At no time did the EFA abandon its desire to be certain that it would receive all the property for which it had paid. There are methods of insuring that the owner has control, if not the possession, of materials stored off-site. One such method is a field warehousing arrangement that would segregate the paid-for property and place it under the owner's control. I find that a reasonably prudent architect in this situation would at least inform and advise his client of any methods of protecting the owner's property interest in materials stored away from the construction site.

The EFA's interest was in receiving all the materials for which it had paid. While defendant checked to see whether the materials in fact existed, defendant did not implement, nor did it even suggest the possibility of, an arrangement whereby the EFA would exercise sole control over the

property. Defendant's duty extended beyond the mere verification that the materials existed. Ewing, Cole's professional duty required it to inform the EFA of any method whereby it could exercise control over its property. Once the EFA had all the facts and options before it, it could make a choice as to what methods it wanted to implement and what expenses it wanted to incur. In this case defendant failed to so inform the EFA; as such, it breached its professional duty. This breach caused damage when Stirling Homex filed for bankruptcy.

Both parties stipulate that as of the filing of a petition in bankruptcy by Stirling Homex, a total of $966,891 had been paid to that body by the EFA. A total sum of $536,492 (less 10% retainage) had been requisitioned and paid on account of materials at the Stirling Homex plant to be incorporated into modules. In addition, a total sum of $488,000 (less 10% retainage) was requisitioned and paid on account of completed modules. A total of $38,169 worth of materials was later incorporated into modules and this amount was credited to the EFA. Finally, the parties stipulate that a completed module cost $4,000. Thus, the breakdown is as follows:

Appendix D

Material charge	$536,492	
Less 10% retainage	53,649	$482,843
Module charge	488,000	
Less 10% retainage	48,800	439,000
Materials credit		(88,169)
Total paid for materials and modules		833,874
98 modules delivered ($4,000 per module)		(392,000)
Total paid for undelivered materials and modules		$441,874

Defendant raises the argument that plaintiff failed to mitigate its damages by not recovering the materials and modules that the EFA owned but were stored at the Stirling Homex plant. "It is well settled that injured parties have a duty to take reasonable steps to mitigate damages. . . ." *McDonald* v. *Mianecki*, 79 N.J. 275, 299 (1979) (citation omitted). "[T]he requirement that plaintiffs mitigate damages prevails as much in the case of damages arising out of tort as it does in the case of breach of contract. . . ." *McGraw* v. *Johnson*, 42 N.J. Super. 267, 274 (App. Div. 1956) (citation omitted).

Stirling Homex' trustee in bankruptcy claimed title to the EFA's property and refused to recognize any interest on the part of the state. Plaintiff disputed the trustee's claim and offered to buy the modules for $2,000 per module if the trustee would put the funds in an escrow account pending the resolution of the ownership question. If the

escrow arrangement was not acceptable, plaintiff offered to buy the modules outright for $700 per module. Both offers were rejected by the trustee. Plaintiff did not institute any legal proceedings to recover the modules; this decision was based on the fact that plaintiff was under pressure from the state to complete the project and felt that a suit would cause considerable delay.

"[T]he rule that a plaintiff must attempt to mitigate damages does not require extraordinary or impractical efforts to do so. Reasonable diligence and ordinary care are all that is required of him. . . ." *Associated Metals, etc., Corp.* v. *Dixon Chemical, etc.*, 82 N.J. Super. 281, 307 (App. Div. 1964) (citation omitted). I find that plaintiff's efforts to mitigate its damages were reasonable under the circumstances.

Judgment shall be entered in favor of plaintiff and against defendant in the amount of $441,874. Plaintiff will submit an order within 10 days. No costs.

March 11, 1982.

APPENDIX E

Judgment of the United States District Court for the District of New Jersey

(Filed—March 22, 1982)

UNITED STATES DISTRICT COURT
District of New Jersey

Civil Action No. 78-934

Honorable Clarkson S. Fisher

THE TRAVELERS INDEMNITY CO., a Connecticuit Corporation,

Plaintiff,

v.

EWING, COLE, ERDMAN & EUBANK, a Pennsylvania Partnership,

Defendant.

ORDER OF FINAL JUDGMENT

This matter having come on for trial, and the case having been presented to the Court, sitting without a jury, on November 30, December 1 and December 2, 1981, in the presence of Lum, Biunno & Tompkins, attorneys for plaintiff, Roger P. Sauer, Esq. appearing and Chasan, Leyner, Holland & Tarrant, attorneys for defendant, Donald F. Ste-

vens, Esq. appearing, and the Court having heard the testimony of the various witnesses as well as having reviewed the documentary evidence submitted and portions of deposition transcripts taken in the course of pre-trial proceedings, and it having issued its written Opinion on March 11, 1982, and good cause existing for the entry of this Order in accordance with that Opinion,

IT IS on this 22nd day of March, 1982,

ORDERED that Judgment in the amount of $441,874.00 is hereby entered in favor of the plaintiff and against the defendant, without costs.

CLARKSON S. FISHER, U.S.D.J.

The undersigned hereby
consent to the form of
the within Order.

LUM, BIUNNO & TOMPKINS
Attorneys for Plaintiff

By: ROGER P. SAUER

CHASAN, LEYNER, HOLLAND & TARRANT
Attorneys for Defendant
By: DONALD F. STEVENS

APPENDIX F

Order Amending Judgment of the United States District Court for the District of New Jersey

(Filed—June 3, 1983)

UNITED STATES DISTRICT COURT
District of New Jersey

Civil Action No. 78-934

Honorable Clarkson S. Fisher

THE TRAVELERS INDEMNITY CO., a Connecticut Corporation,

Plaintiff,

v.

EWING, COLE, ERDMAN & EUBANK, a Pennsylvania Partnership,

Defendant.

ORDER AMENDING JUDGMENT

This matter being opened to the Court by Lum, Biunno & Tompkins, attorneys for plaintiff, upon notice to Chasan, Leyner, Holland & Tarrant, attorneys for defendant, and the parties having appeared on the return of the Motion and submitting the matter to the Court for adjudication in accordance with Rule 78 of the Federal Rules of Civil Pro-

cedure, and it having reviewed the various moving and opposing papers, together with all other proceedings to date, and good cause existing for the entry of this Order,

IT IS on this 3rd day of June 1982,

ORDERED that this Court's Judgment of March 11, 1982 is hereby amended so as to reflect an award of prejudgment interest in favor of the plaintiff and against the defendant, the same to be calculated as simple interest at 12% per annum from November 30, 1976 to March 22, 1982; and it is

FURTHER ORDERED that except as expressly provided hereinabove, this Court's Order of Judgment dated March 11, 1982 is continued in full force and effect.

CLARKSON S. FISHER, U.S.D.J.

The undersigned hereby
consent to the form of
the within Order.

LUM, BIUNNO & TOMPKINS
Attorneys for Plaintiff

By: ROGER P. SAUER

CHASAN, LEYNER, HOLLAND & TARRANT
Attorneys for Defendant
By: DONALD F. STEVENS

APPENDIX G

28 U.S.C. §1291

§ 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.